IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE	**PETITIONER**
v.	**NO. 2015-JP-00996-SCT**
JUDGE DAVID SHOEMAKE	**RESPONDENT**

RECORD EXCERPTS OF THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

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BEFORE THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING A JUDGE
NO. 2013-083

COMMISSION FINDINGS OF FACT AND RECOMMENDATION

This matter came on for Formal Hearing on March 12, 2015, in the office of the Mississippi Commission on Judicial Performance ("Commission") in Jackson, Mississippi, on the Second Amended Formal Complaint of the Commission before a Committee comprised of Justice Court Judge Jimmy Morton and Roy Campbell, III, Esq., Presiding. Representing the Commission were Bonnie H. Menapace, Esq. and Meagan C. Brittain, Esq. Representing the Respondent, David Shoemake, Chancellor, 13th District, State of Mississippi ("Respondent"), was William H. Jones, Esq.

Having heard and considered the evidence, both oral and documentary, the Committee found, concluded and recommended to the full Commission the following:

PARTIES AND JURISDICTION

The Commission is a body created pursuant to Section 177A, Mississippi Constitution of 1890, as amended.

The Respondent is now and was at all times hereinafter mentioned, a Chancery Court Judge for the 13th Chancery Court District, State of Mississippi, having been elected in November, 2010, and in office since January, 2011.

The Commission has jurisdiction over the Respondent under the authority granted by Section 177A of the Mississippi Constitution of 1890, as amended, applicable statutes, and the Rules of the Commission.

PROCEDURAL HISTORY

On October 11, 2013 at its regularly scheduled meeting, the Commission found probable cause to file a Formal Complaint against the Respondent in Inquiry Concerning a Judge No. 2013-083. Upon further motion, in accordance with Rule 7 of the Rules of the Commission, the Commission voted unanimously to order, and ordered, the Respondent to show good cause why the Commission should not recommend that Respondent be suspended from office while that Inquiry was pending.

On October 17, 2013, the Commission filed a Formal Complaint charging Respondent with judicial misconduct violating Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code of Judicial Conduct of Mississippi Judges ("the Code") and that Respondent's conduct violated Section 177A of the Mississippi Constitution of 1890.

On November 1, 2013, a Show Cause hearing was held in this matter before a duly constituted Committee ("the Committee") of the Commission.[1]

On or about November 18, 2013, Respondent filed his Answer to Formal Complaint.

On November 19, 2013, the Committee recommended against an interim suspension and, on December 13, 2013, at its regularly scheduled meeting, the Commission adopted that recommendation and voted to not recommend an interim suspension during the pendency of the Formal Complaint.

On July 11, 2014, after being granted leave to do so by the Committee, the Commission filed its Amended Formal Complaint. The Amended Formal Complaint

1 The Committee as constituted at the time of the Show Cause hearing consisted of Commission members Hon. Robin Midcalf, Hon. Jimmy Morton and Roy Campbell, Esq.

charged Respondent with three counts of judicial misconduct: Count One charged judicial misconduct violating Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code; Count Two charged judicial misconduct violating Canons 1, 2A, and 3B(2) of the Code; Count Three charged misconduct which violated Section 177A of the Mississippi Constitution, constituting willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

On July 31, 2014, Respondent filed his Answer to Amended Formal Complaint.

On October 22, 2014, after again being granted leave to do so by the Committee, the Commission filed its Second Amended Formal Complaint. The Second Amended Formal Complaint charged Respondent with three counts of judicial misconduct: Count One charged judicial misconduct violating Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code; Count Two charged judicial misconduct violating Canons 1, 2A, and 3B(2) of the Code; Count Three charged misconduct which violated Section 177A of the Mississippi Constitution, constituting willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

On December 3, 2014, Respondent submitted for filing by facsimile his out-of time Answer, Defenses and Affirmative Matters. On March 12, 2015, the Committee denied the Commission counsel's motion to strike that answer, but with the caveat that the Committee was not agreeing that extraneous information and allegations in that answer were relevant. (T. 30-31).[2]

2 Citations to the transcript from the Formal Hearing on March 12, 2015 are designated herein as "(T. _)". Citations to exhibits admitted during the Formal Hearing are designated herein as "(Ex. _ at _)".

As stated above, on March 12, 2015, in Jackson, Mississippi, the Formal Hearing commenced before the Committee and evidence, both testimony and documents, was received; that hearing was recessed at the end of the day for receipt of supplemental evidence.[3]

Subsequently, the parties executed a Stipulation dated March 23, 2015, with attached exhibits, that stipulation was submitted to and marked by the court reporter as an exhibit and, effective with the date noted on that stipulation by the court reporter, April 10, 2015, the hearing was concluded.

By Order dated April 17, 2015, the Commission granted the Committee additional time, through and including May 11, 2015, within which to submit its findings and recommendation. Those findings were filed on May 11, 2015.

On May 11, 2015, the Committee also entered an Order supplementing the record with a seventeen-page fax dated July 21, 2011.

On June 1, 2015 Respondent filed his Motion to Supplement Clerks Papers.

By agreement of the parties and the Committee, on June 2, 2015, Respondent and Commission counsel filed their objections to the Findings and Recommendation of the Committee.

In addition, on June 2, 2015, Respondent filed a Motion to Appear before the Full Commission on Judicial Performance or, in the Alternative, to Exclude Participation of Committee Members from Review of the Findings and Recommendations of the

3 The Committee as constituted at the time of the Formal Hearing consisted only of Commission members Hon. Jimmy Morton and Roy Campbell, Esq. Hon. Robin Midcalf's appointment to the Commission expired prior to commencement of the Formal Hearing.

Committee. Commission counsel responded to said Motion on June 3, 2015. Respondent responded to the Commission's reply on June 8, 2015.

On June 10, 2015 Respondent filed a Motion to Seal the Record and Maintain Confidentiality of all Proceedings before the Commission on Judicial Performance Following Review of the Findings and Recommendations of the Committee. Commission counsel responded that same day to Respondent's Motion to Seal the Record and Maintain Confidentiality of All Proceedings before the Commission on Judicial Performance Following Review of the Findings and Recommendations of the Committee as well as Respondent's June 1, 2015 Motion to Supplement Clerks Papers.

On June 11, 2015, the full Commission convened and considered the pleadings wherein arguments were made in support of and in opposition to Respondent's Motion to Appear before the Full Commission on Judicial Performance or, in the Alternative, to Exclude Participation of Committee Members from Review of the Findings and Recommendations of the Committee; Motion to Seal the Record and Maintain Confidentiality of all Proceedings Before the Commission on Judicial Performance Following Review of the Findings and Recommendations of the Committee; and Motion to Supplement Clerks Papers together with Commission counsel's responses. Respondent's motions were denied and orders were entered to that effect on June 12, 2015 by the Chairman of the Commission, Judge Lee J. Howard.

On June 12, 2015, the full Commission convened and considered the Findings and Recommendation of the Committee, as well as the objections filed by Respondent and

Commission counsel. By clear and convincing evidence, the Commission approved and adopted the following findings and recommendations:

FINDINGS

Based upon the evidence received during the Formal Hearing of this matter, together with the aforesaid supplementation, following review and study of the Findings and Recommendation of the Committee, together with the June 2, 2015 objections filed by Respondent and Commission counsel, and with due consideration of the factors delineated in *Miss. Comm'n on Judicial Performance v. Gibson,* 883 So. 2d 1155, 1158 (Miss. 2004), as modified by *Miss. Comm'n on Judicial Performance v. Skinner,* 119 So. 3d 294 (Miss. 2013), the Commission finds the following facts by clear and convincing evidence:

Respondent is now and was at all relevant times the duly elected Chancellor for the 13th Chancery Court District, State of Mississippi.

The Court File:

The following facts are established primarily by the conservatorship file maintained in the office of the Chancery Clerk of Simpson County, Mississippi. (Ex. 5).

On or about July 14, 2010, Respondent's former fellow Chancellor, Joe Dale Walker, signed a decree appointing Marilyn Denise. Newsome ("the Conservator") as conservator of the estate of her daughter, Victoria Denise Newsome ("the ward") in *In the Matter of the Conservatorship of Victoria Denise Newsome,* Cause No. 2010-0146, in the Chancery Court of Simpson County, Mississippi. (Ex. 5 at 19-20). The ward later received a settlement in a medical negligence claim, being represented in that case by the law firm

of Merkel & Cocke, and that settlement was approved by former Chancellor Walker. (Ex. 5 at 42-49).

Subsequently, Walker ordered that a house be constructed for the use and benefit of the ward and that a minimum of four bids should be obtained by the attorney for the conservator, Keely R. McNulty, Esq. ("McNulty"). (Ex. 5 at 61). The lowest bid submitted was from C.T. Construction, a company owned by Walker's nephew, Chad Teater. (Ex. 5 at 185, 199). Walker, on July 22, 2011, entered an Order Transferring Cause for Limited Purpose. That order recited that the transfer to Respondent was made "for the limited purpose of approving and acceptance of the bid(s) for the construction of the home for the ward. Upon approval and acceptance, the cause is to be transferred back to Honorable Joe Dale Walker, Post 2." (Ex. 5 at 93).

The day before that order was entered, on July 21, 2011, McNulty sent Respondent a seventeen page fax, including a petition, proposed order and five bids. (Ex. 24). The bid from C.T. Construction included with that fax was in the amount of $296,575.14. (Ex. 24 at 4).

The following day, July 22, 2011, Respondent signed an order authorizing the Conservator to accept the lowest bid, in the sum of $273,075.14 from C.T. Construction, for construction of the home, and transferring the case back to Walker. (Ex. 5 at 99-100). The order was filed by the Chancery Clerk on August 2, 2011. (*Id.*). Although that order recites that copies of the five (5) bids received were attached to the order as exhibits, no bids are attached to that order on file in the clerk's office. (*Id.*) At the time that order was filed no petition requesting that relief was on file, and the Conservator neither gave

McNulty permission nor had knowledge of that request for relief. (Ex. 7; T. 115). Nine months later, on April 24, 2012, McNulty filed two Petitions for Approval of Contractor, both of which requested approval of the C.T. Construction bid of $273,075.14 and both of which had five (5) bids attached. (Ex. 5 at 185-98, 199-215). Both copies of the C.T. Construction bid were for $296,575.14.[4] Neither petition was sworn to and neither was signed by the Conservator.

Thereafter, on July 28, 2011, after Respondent had transferred the matter back to Walker, Respondent signed an order, again submitted by McNulty, authorizing and ordering the approval of C.T. Construction's "attached" Construction Management Agreement, including a $30,000.00 fee, and approval of contractors' and subcontractors' invoices in accordance with an "attached" itemized proposal, and also authorizing the Conservator to sign that Construction Management Agreement. (Ex. 5 at 101-02). Nothing is attached to that order as filed with the clerk's office.[5] (*Id.*) No petition requesting that relief was ever filed, and the Conservator neither gave her permission nor had knowledge of McNulty's request for relief. (Ex. 7; T. 116-17).

On August 2, 2011, after he had transferred the case back to Walker, Respondent signed an order authorizing and ordering the law firm of Merkel & Cocke to transfer the sum of $258,395.14 from their escrow account to the conservatorship account for the construction of the home. (Ex. 5 at 103-04). No petition requesting that relief was ever filed, and the Conservator neither gave her permission nor had knowledge of that request for relief. (Ex. 7; T. 117-18).

4 Those five bids appear identical to the five bids faxed the day before by McNulty to Respondent. (Ex. 24 at 4-15).
5 Duplicates of that Construction Management Agreement, marked as "Exhibit B" but unattached to a petition or order, appear in the court file. (Ex. 5 at 119-20).

On January 24, 2012, McNulty filed a petition, said to be on behalf of the Conservator, requesting that $23,000.00 be paid to C.T. Construction for reimbursement for materials allegedly stolen from the construction site. (Ex. 5 at 127-31). The Conservator neither signed that petition nor was she given notice of it. (T. 118-19). The following day, January 25, 2012, in spite of having transferred the case back to Walker, Respondent signed an order directing payment of $23,000.00 to C.T. Construction for the allegedly stolen materials. (Ex. 5 at 132-33). The order makes no reference to the existence of any hearing being held or the existence of any evidence presented that the materials were stolen because of any fault attributable to the Conservator or ward, or otherwise that C.T. Construction was entitled to be reimbursed from assets of the ward. (*Id.*) An affidavit attached to the petition, from the contractor himself, attributes no fault to the Conservator or ward, gives no basis for charging the loss to them, and in fact indicates that the materials might never have been delivered to the job site. (Ex. 5 at 129).

On March 14, 2012, Terrell Stubbs, Esq. ("Stubbs"), filed an Entry of Appearance of Counsel, appearing as counsel for Marilyn Newsome, both individually and in her capacity as Conservator. (Ex. 5 at 145-46; Ex 7).

On March 20, 2012, McNulty filed her first Motion to Withdraw as Counsel for the Conservator. (Ex. 5 at 150-52).

In spite of having transferred the case back to Walker, Respondent signed an order on March 26, 2012, noted to be *nunc pro tunc* to August 2, 2011. (Ex. 5 at 219-20). Handwritten notations on the order indicate that the order was "filed" by Walker on March 26, 2012 and received by the Chancery Clerk's office on April 24, 2012. (*Id.*; Ex. 7). The

order references a "Petition for Approval of Correction of Construction Fund Amount and to Authorize Transfer and Withdrawal of Funds." (Ex. 5 at 219-20). No such petition was filed with the clerk until nine (9) months later, on April 24, 2012; that petition was not sworn to and was neither signed by nor discussed with the Conservator. (Ex. 5 at 183-84; T. 121-22). The order "finds and adjudicates," in pertinent part, that the original bid amount accepted, $273,075.14, was wrong due to a typographical error and that the actual bid amount was $296,575.15. (Ex. 5 at 219-20). The order directed the transfer of $23,500.00 to the conservatorship account. (*Id.*). All of this was done after the matter had been transferred back to Walker, with no petition filed by the Conservator and no notice to the Conservator or her new counsel, Stubbs. (T. 121-22; 124-25).

The Show Cause Hearing:

Respondent met with Commission staff on August 23, 2013 to discuss actions taken in the conservatorship. Following that meeting Respondent searched his office, reviewed a copy of the court file from the clerk's office and generally familiarized himself with the proceedings. (T. 182; Ex. 4 at 10, 23-24).

At the November 1, 2013, Show Cause hearing Respondent was asked specific questions regarding whether or not Respondent's signatures were on the orders discussed above. As detailed below, under oath Respondent adamantly and repeatedly denied signing those orders, with the exception of the July 22, 2011 order awarding the bid to C.T. Construction.[6] (Ex. 4 at 49, 52). He was equally adamant that he never signs an order without an accompanying petition. (Ex. 4 at 45).

6 Ex. 5 at 99-100.

The order dated July 28, 2011 makes no reference to an accompanying petition, and none is on file. (Ex. 5 at 101-02; Ex. 7). Yet Respondent insisted that he never signs an order without a petition. (Ex. 4 at 45). And with respect to that order, Respondent distanced himself from any involvement with it with the explanation that it contained paragraphs that he had previously rejected. (Ex. 4 at 50). In short, Respondent denied signing that order; that changed following a handwriting analysis.

Concerning the order dated August 2, 2011 (filed August 9, 2011), Respondent testified at the Show Cause hearing: "I'll say no, it's not my signature. It looks like my signature. But I don't think it's my signature. I think it's been transposed or cut and pasted or something." (Ex. 4 at 30).[7] As the questioning continued concerning that order, Respondent grew more insistent:

> Q: So you maintain that this is not your signature on the order filed on August 9th and dated August 2nd?
>
> A: Yes ma'am, that's what I maintain. And, if you will notice, the order that has the date August 2nd, 2011, has been cut and pasted. It's got three computer fonts on the front page. And it tries to cut in this language from the copy of the order that she sent me at 3:59 an [sic] August 2, 2011.
>
> So the order has obviously been messed with. Somebody has cut and pasted.

(Ex. 4 at 37).[8] Then, to remove any doubt that he had not signed that order, Respondent made this absolute, unconditional statement:

> I have never in my life signed a second page with a signature blank on it and that's all; as a lawyer doing deeds or accepting deeds or any kind of document. I would not have signed my name on a page with my signature blank alone, because it just throws into credibility the first page.
> You can change the two pages, make them interchangeable. And I

7 Ex. 5 at 103-04.
8 Ex. 5 at 103-04.

had already refused these requests.

(*Id.*). And finally, Respondent testified, "And somehow or another an order got entered that David Shoemake did not participate in getting entered." (Ex. 4 at 40-41). Again, that changed following a handwriting analysis.

When Respondent was asked at that Show Cause hearing about his signature on the order dated January 25, 2012 (filed February 2, 2012),[9] directing payment of $23,000 for the "stolen" materials, his response was again unconditional: "It is not my signature." (Ex. 4 at 44). When asked if he had conversations with McNulty concerning the petition for that order, he insisted that he had never had any conversations with her about those stolen materials. (Ex. 4 at 44). According to Respondent: "When this stuff was shown to me in August, I got physically sick, because I have never heard of this. I've never heard of this stuff." (*Id.*). He went further in trying to distance himself from the order:

> I do not practice law or be a judge this way. *I do not sign orders without petitions.* And I don't sign them unless the petitions are done right. And I've reviewed this, and this is not stuff that I would have put my name on.
>
> . . . .
>
> I don't have a satisfactory explanation. I can't – I can't figure it out. And I can't name names or point fingers. But somehow or another somebody put my signature on an order without presenting that order to me.
>
> I don't do business that way. I just do not do business that way as a judge.

(Ex. 4 at 45). He further disavowed any involvement with ordering the $23,000 payment without evidence: "I would have never--if they had presented it to me, I wouldn't—have not have (sic) signed it unless evidence had been presented.... I would have had to have some kind of police report or sheriff's report or something on materials. And then I would

9 Ex. 5 at 132-33.

have to have something to show that the ward was responsible." (Ex. 4 at 45-46). Under questioning by his own counsel he testified that the signature on that order does not even look like his, that "it's not my signature(,)" and that "I definitely would not do it (direct payment of the $23,000) if the fiduciary hadn't signed off on it ...." (Ex. 4 at 70-71). As with the others, that changed following a handwriting analysis.

Respondent was next asked at the Show Cause hearing about signing the order dated March 26, 2012, the one that found a "typographical error" in the July 22, 2011, order and increased the amount of the accepted bid by $23,500, from $273,075.14 to $296,575.14.[10] Respondent's denials of signing that order, specifically his explanations for why he would never have signed such an order, are telling:

> Q: Judge, if you'll look on the second page and tell us whether or not that is your signature.
> A: No. ma'am, it is not my signature.
> ....
> A: ... But I did not sign this order. I would never have signed this order increasing a bid.
> I believe if somebody had come before me with evidence, I would not have signed that order. You just don't change a bid six months after letting the bid.
> ....
> A: ... Why would anybody present me with a petition and an order when I'm not the judge in the case?
> I'm post one. This is post two....

(Ex. 4 at 46-49). He even insisted that the petition seeking that "correction" was never presented to him. (Ex. 4 at 46.) Again, all of that changed following a handwriting analysis.

10 Ex. 5 at 219-20.

The Handwriting Analysis:

Following the Show Cause hearing, Commission counsel employed a handwriting expert to examine the orders; that analysis, received by Commission counsel in December, 2013, established that all orders discussed above bore Respondent's signature. (T. 314). That was disclosed to Respondent in January, 2014, and the following month Respondent admitted that he had in fact signed all the orders. (T. 314-15).

The Formal Hearing:

At the Formal Hearing Respondent admitted signing all of the orders in controversy. (T. 162; 172; 176; 181).

The Conservator, who appeared both sincere and credible, testified that she had never spoken with Walker, McNulty, or Respondent concerning details of the construction of the house. (T. 126). That is corroborated by McNulty's signed statement dated July 30, 2013, introduced into evidence by Respondent, in which McNulty admitted that Judge Walker directed her not to involve the Conservator in construction of the home. (Collective Ex. 11). The Conservator explained that it was during a hearing that Judge Walker first broached the subject of building a new home. (T. 144-45). She was never told how much the contractor would be paid from the ward's funds. (T. 126-27). She also testified that, although she appeared before Judge Walker several times, she had never seen Respondent. (T. 139, 154). According to McNulty's signed statement dated October 22, 2013, also introduced into evidence by Respondent, no inspections of the home were ever conducted and no formal walk-through was conducted upon "completion." The

contractor "just gave the keys to (the Conservator) one day and that was it." (Collective Ex. 11).

Respondent testified at the Formal Hearing that he was justified in signing the orders after transferring the matter back to Walker because that was customary, he "didn't see anything wrong with it at that time ... I have jurisdiction. And judges can accommodate one another in the same district." (T. at 202). In fact, he never gave that a second thought: "*I don't remember that even being an issue.*" (T. at 341). Yet he then contradicted himself, saying that he only did it because McNulty told him that was what Walker wanted: "I continued to sign orders because Keely McNulty represented to me that Judge Walker wanted me to, on the house. *I wouldn't have done it otherwise.*" (*Id.* at 345). Not only are those two versions inconsistent, they contradict his position at the Show Cause hearing, which was that he would not have been presented with a petition and order in a matter assigned to Walker: "Why would anybody present me with a petition and an order when I'm not the judge in the case? I'm post one. This is post two." (Ex. 4 at 48). In fact, the assignment of the matter to Walker, not to him, was one of Respondent's fundamental premises at the time of the Show Cause hearing for why he never signed any of the four orders. And when he was asked at the Formal Hearing why, at the Show Cause hearing, he did not simply explain that he signed the orders because McNulty told him that was what Walker wanted, he had no answer: "I can't answer that. I don't know." (T. at 346).

Respondent was confronted at the Formal Hearing with his earlier testimony that he never signs an order if the accompanying petition is not in proper form (Ex. 4 at 45), yet

not one of the petitions that were filed was signed or verified by the Conservator. (Ex. 5 at 127-31, 183-84, 185-98, 199-215). Respondent conceded nothing, despite the clear language of Uniform Chancery Court Rule 6.13 requiring that pleadings be signed and sworn to by fiduciaries. He sought to justify that with the explanation that he had McNulty's signature. According to Respondent, McNulty was the fiduciary, and as counsel of record her unsworn petition was sufficient. He sees no need in Rule 2.02's requirement that pleadings be filed before presentation to him, and his customary practice, which he consistently indulged with McNulty, is to excuse Rule 5.05's requirement that the court file be presented to him. According to her signed statement dated October 22, 2013, McNulty had been practicing law less than one year when she became involved in the conservatorship. (Ex. 11).

Respondent sufficiently explained his involvement with the $23,500 "typographical error" in the bid amount, at least as that concerned the July 22, 2011 order that he re-drafted and signed. That order recited that the amount of C.T. Construction's low bid was $273,075.15. Yet the day before he had received from McNulty C.T. Construction's bid of $296,575.15. (Ex. 24 at 4). That lower amount was inadvertently inserted when he dictated, or his assistant typed, his substitute order. (T. 189-91, 305, 320). The problem that creates for Respondent is the resulting conflict with his clear and unequivocal testimony at the Show Cause hearing. At that earlier hearing Respondent insisted that he was "certain" that when he drafted that July 22, 2011 order he looked at a bid in that lower amount, $273,075.15. (Ex. 4 at 20). As it turns out, of course, Respondent never had a bid from C.T. Construction for $273,075.15. He included that wrong amount in the order he

prepared because he was not paying attention—he never examined the bids McNulty faxed to him on July 21, 2011. He simply copied that $273,075.15 from the proposed order that McNulty had submitted to him. Had he taken the time to actually inspect the bids he would have seen not only that C.T. Construction's bid was for $296,575.15, not $273,075.15, but that it included a qualifier/escape clause printed immediately beneath that bid amount: "Cost projections are estimates only and *subject to change*:" (Ex. 24 at 4). That "subject to change" language should have rendered that bid unacceptable, or at least have prompted some inquiry. Once accepted, that qualifier gave C.T. Construction the right to raise its price, burdening the ward's estate with price increases. None of the other four bids included that language. (Ex. 24 at 8-15).[11] Yet Respondent accepted and approved that language, without any questions asked.

Respondent never explained the contradiction created by, on the one hand, his insistent and unequivocal testimony at the Show Cause hearing that he did not and would not sign an order without an accompanying petition with, on the other hand, his admission that he signed the July 28, 2011 and August 2, 2011 orders, for which no petitions exist (and none is referred to in those orders).

Concerning the January 25, 2012 order signed by Respondent awarding C.T. Construction $23,000 from the ward's estate for "stolen" materials, the Conservator testified that she witnessed employees of C.T. Construction stealing the materials. (T. 119-20). Her testimony was directly supported by the July 30, 2013, statement of

11 Just as in C. T. Construction's bid, three of the other four bids contained "allowances." The Commission takes judicial notice of the fact that construction "allowances" are for items (e.g., hardware, lighting fixtures, window treatments, etc.) that have not yet been selected or specified, allowing for flexibility, but that the amounts allotted for those allowances are included in, not in addition to, the bid price. *See* Miss. R. Evid. 201(c)

McNulty, offered into evidence by Respondent, who explained that the Conservator had complained to the contractor of seeing his own employees take the materials. (Ex. 11). When Respondent was asked at the Formal Hearing about any basis for ordering that $23,000 payment, Respondent referenced a provision in the Construction Management Agreement which he then recalled that McNulty had read and explained to him three years earlier.[12] (T. 335-36). At the Show Cause hearing, when Respondent adamantly denied signing that order, he testified not only that he had no memory of any events related to that order, he insisted that he "would have had to have some kind of police report or sheriff's report or something on materials. And then I would have to have something to show that the ward was responsible." (Ex. 4 at 44-46). McNulty explained that she had no discussion with Respondent about that order. According to her July 30, 2013, signed statement (offered by Respondent), she merely left it with his court administrator and he signed it, no questions asked. (Ex. 11).

No issue was raised, and no evidence was presented, that Respondent engaged in any concerted action to award funds from the conservatorship which Respondent knew were not justified. Nor was an issue raised, or evidence presented, that Respondent benefitted financially from any of the orders he signed which resulted in dissipation of the ward's estate.

However, the Commission does find, from clear and convincing evidence that Respondent repeatedly failed to exercise diligence and oversight to protect the assets and best interests of the ward. For example, Respondent did not enforce Uniform

12 The provision in the Construction Management Agreement states only that "Homeowner will be responsible for all insurance coverage and will not hold Contractor liable." (T. 335-36).

Chancery Court Rule ("UCCR") 2.02 (requiring pleadings, i.e., petitions, to be filed with the clerk before being presented to him), 5.05 (presentation of the court file), and, most importantly, 6.13 (execution and verification of pleadings by the fiduciary). Those failures likely did result in dissipation of the ward's assets.

To be sure, Respondent ignored altogether his responsibilities to serve as the "superior guardian" of the ward:

> Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule for the court of chancery to act as the superior guardian for all persons under such disability. This inherent and traditional power and protective duty is made complete and irrefragable by the provisions of our present state constitution.... It is the inescapable duty of the said court and of the chancellor to act with constant care and solicitude towards the preservation and protection of the rights of infants and persons non compos mentis. The court will take nothing as confessed against them; will make for them every valuable election; *will rescue them from* faithless guardians, *designing strangers*, and even from unnatural parents, and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court. The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct. Grif. Chan. Prac. §§ 45, 360, 530, 533. All persons who deal with guardians or with courts in respect to the rights of infants are charged with the knowledge of the above principles, and act to the contrary thereof at their peril.

Union Chevrolet Co. v. Arrington, 138 So. 593, 595 (Miss. 1932) (emphasis added). Here, Respondent's duty to act as superior guardian was particularly acute, where the Conservator was not shown to be sophisticated, or even well educated, and McNulty was a young lawyer with very limited experience, which Respondent knew or should have known.

The Commission further finds from clear and convincing evidence that Respondent did not testify truthfully at the Show Cause hearing concerning his signatures on the orders, and that his explanations at both the Show Cause hearing and the Formal Hearing were inconsistent, not credible and were intended to mislead the Commission about his failures. His testimony at both hearings showed a lack of candor.

Respondent has requested dismissal on the grounds that he was not notified of the initial complaint within ninety (90) days of its receipt by the Commission, as required by Rule 5(C) of the Rules of the Commission. Respondent is correct that the rule requires that notice within ninety days. However, that same rule expressly states that non-compliance shall *not* be a basis for dismissal of the proceedings. If Respondent did not know that a complaint was pending against him when he was first interviewed at the Commission's offices, and/or if Respondent did not have adequate time within which to familiarize himself with the conservatorship proceedings prior to the Show Cause hearing (which Respondent testified at the Show Cause hearing was not the case), Respondent could have indicated that he was unsure, he was unprepared or that he was otherwise unable to say whether the signatures on the orders were actually his or not. Instead he chose to be absolutely certain, and to deny that the signatures were his.

The Commission must first decide whether Respondent's conduct constitutes willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, in accordance with §177A of the Mississippi Constitution of 1890, as amended. If the Commission determines that Respondent's

conduct constitutes willful misconduct in office, then it must determine the appropriate sanction.

Recent pronouncements from the Supreme Court of Mississippi make clear what constitutes "willful misconduct in office":

> (T)he improper or wrong use of power of his office by a judge acting intentionally or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a mere act of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. . . .
>
> Willful misconduct in office of necessity is conduct prejudicial to the administration of justice which brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute.

Miss. Comm'n on Judicial Performance v. Harris, 131 So. 3d 1137, 1142 (Miss. 2013) (quoting *In Re Quick*, 553 So. 2d 522, 524-25 (Miss. 1989)); *see also Miss. Comm'n on Judicial Performance v. Bowen*, 123 So. 3d 381 at 384 (Miss. 2013); *Miss. Comm'n on Judicial Performance v. Sanford*, 941 So. 2d 209, 212-13 (Miss. 2006) (quoting *Gibson*, 883 So. 2d at 1157).

"[A]ctual willfulness is not always required, as a judge's 'negligence or ignorance not amounting to bad faith' can have the same effect of being prejudicial to the administration of justice and bringing the judicial office into disrepute." *Miss. Comm'n on Judicial Performance v. Fowlkes*, 121 So. 3d 904 at 907 (Miss, 2013) (quoting *Miss. Comm'n on Judicial Performance v. Hartzog*, 32 So. 3d 1188, 1193 (Miss. 2010) (quoting

In re Anderson, 451 So. 2d 232, 234 (Miss. 1984)). "'[M]isconduct does not have to be embedded in any form of bad behavior' — ignorance and incompetence can amount to conduct that violates Section 177A of the Mississippi Constitution." *Harris,* 131 So. 3d at 1142 (quoting *Quick,* 553 So. 2d at 527).

Violations of canons of the Code of Judicial Conduct can amount "to a violation of Section 177A of the Mississippi Constitution, where [the judge's] actions [constitute] willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Fowlkes,* 121 So. 3d at 907.

"According to its Preamble, the Mississippi Code of Judicial Conduct, . . . establishes 'standards of ethical conduct of judges.' " *In Re Bell,* 962 So. 2d 537, 542 (Miss. 2007) (citations omitted). The Preamble states, in pertinent part:

> The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.
>
> The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

The Second Amended Formal Complaint asserted that by engaging in the above stated conduct, Respondent violated Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code. Those Canons state, in pertinent part:

CANON 1 A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective,

Commentary Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judicial)' and thereby does injury to the system of government under law.

CANON 2 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether, based on the conduct, the judge's impartiality might be questioned by a reasonable person knowing all the circumstances.

B. Judges shall not allow their family, social, or other relationships to influence the judges' judicial conduct or judgment. Judges shall not lend the prestige of their offices to advance the private interests of the judges or others; nor shall judges convey or permit others to convey the impression that they are in a special position to influence the judges.

Commentary Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilities the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

B. Adjudicative Responsibilities.
(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

....

(7) A Judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that

end.

> **C. Administrative Responsibilities.**
> (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

Upon due consideration of the credible testimony, the documents admitted into evidence and the law, the Commission finds by clear and convincing evidence that Respondent's conduct in connection with the administration of the Newsome Conservatorship violated Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8) and 3C(1) of the Code of Judicial Conduct of Mississippi.

Upon due consideration of the credible testimony, the documents admitted into evidence and the law, the Commission finds by clear and convincing evidence that Respondent's testimony in the November 1, 2013 Show Cause hearing violated Canons 1, 2A and 3B(2) of the Code of Judicial Conduct of Mississippi

In determining the appropriate sanctions, the Mississippi Supreme Court has held:

> The sanctions in judicial-misconduct cases should be proportionate to the judge's offense. To determine whether the recommended sanctions are proportionate to the offense, this Court follows a six-factor test, which includes: "(1) the length and character of judge's public service; (2) whether there is any prior case law on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of conduct;" (5) whether the conduct was willful, intended to deprive the public of assets, or if it exploited the judge's position; and "(6) the presence or absence of mitigating or aggravating factors."

Harris, 131 So. 3d at 1144 (citing *Miss. Comm'n on Judicial Performance v. Boykin,* 763 So. 2d 872, 876 (Miss. 2000); *Skinner,* 119 So. 3d at 300, 307).

(1) The length and character of the judge's public service.

Respondent became a judge in January 2011. Respondent is in his second term as a Chancellor.

(2) Whether there is any prior case law on point.

The Supreme Court has been very clear on the seriousness of a judge not making truthful statements while under oath in a Commission hearing,

> A proceeding before the Commission on Judicial Performance is no different than from a trial and a trial is a proceeding designed to be a search for the truth. When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit.

Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107, 115 (Miss. 2009). Accordingly in *Miss. Comm'n on Judicial Performance v. Willard,* a case in which the respondent judge's testimony was deemed to be not credible by the Commission, the Supreme Court found that those statements were willful misconduct. The Supreme Court stated: "[t]he commission concluded Willard's testimony was tantamount to perjury" during his Commission hearing. The Supreme Court found the "[t]he Commission correctly concluded Willard's lack of candor constituted willful misconduct in violation of Section 177A of the Mississippi Constitution." *Willard,* 788 So. 2d 736, 744 (Miss. 2001).

As stated above, this Commission finds from clear and convincing evidence that Respondent did not testify truthfully at the Show Cause hearing concerning his signatures on the orders, and that his explanations at both the Show Cause hearing and the Formal Hearing were inconsistent, not credible and were intended to mislead the Commission about his failures. His testimony at both hearings showed a lack of candor.

(3) The magnitude of the offense and the harm suffered.

To begin, the bid of C.T. Construction should never have been accepted, let alone adjusted to add $23,500 to the stated amount of the accepted bid. The petition submitted in support of the July 22, 2011, order accepting the bid was neither signed nor verified by the fiduciary, and it was not filed until nine months after that order was signed. (Ex. 5 at 185-86). Likewise, the petition submitted in support of the March 26, 2012 order "correcting" the bid amount was neither signed nor verified by the fiduciary. (Ex. 5 at 183-84). No sworn evidence was offered to show Respondent that C.T. Construction was a reputable contractor. No hearing was held. The home has "a lot of problems," including inadequate insulation resulting in monthly electrical bills as high as $2,000 and the need for remedial work. (T. 127-28). In addition, as stated, Respondent never examined the bids submitted, for if he had he would have seen that the amount of C.T. Construction's bid was $296,575.15, not $273,075.15, and he also would have seen C.T. Construction's disclaimer reserving the right to raise its price later, language which none of the other bids contained. (Ex. 24 at 4). The construction of that house for that price was a significant loss for the ward. Apart from the extravagant monthly expenses her estate regularly incurs for unreasonably high utility bills, costs must be expended to remediate the home's deficiencies.

The ward's estate lost another $23,000 because of Respondent's unjustified award of that sum to C.T. Construction for materials "stolen" from the construction site. No petition signed and verified by the fiduciary was submitted, no hearing was held and no evidence adduced to show any legal liability for that on the part of the Conservator or the

estate, or otherwise to support any such award, and in fact the evidence at the Formal Hearing was that the materials were stolen by the contractor's own employees. The egregiousness of that award is nowhere more apparent than in Respondent's own testimony at the Show Cause hearing. There Respondent testified that he would never, under any circumstances, approve such an award—in his words, approval of that $23,000 from the ward's estate under the circumstances reflected in that order made him "sick". Only after a handwriting analysis showed that he had in fact signed that order, and approved that payment, did he later try to justify it, at the Formal Hearing, by claiming that he relied on an agreement the Conservator signed. That was an agreement which was not in evidence, which Respondent did not remember ever seeing, and which only obligated the Conservator to purchase unspecified insurance.

Apart from that monetary harm, the public's confidence in, and perception of, the judiciary as a whole has certainly diminished because of Respondent's lack of diligence and oversight.

(4) Whether the misconduct is an isolated incident or evidences a pattern of conduct.

Respondent ignored the mandates of the Code of Judicial Conduct as well as the laws and rules that govern practice in Mississippi Chancery Courts. Respondent's testimony describes a pattern of conduct that he has followed since he took office—petitions not required, fiduciary verifications not required, evidence not required. His testimony at the Formal Hearing revealed that he handled many cases in just the same manner that he handled the Newsome Conservatorship, for none of which he voiced or suggested any remorse. Respondent never once acknowledged that his

practices or his interpretations of the Uniform Chancery Court Rules should be improved or reconsidered.

(5) Whether the conduct was willful, intended to deprive the public of assets, or if it exploited the judge's position.

When, during the November 1, 2013 Show Cause hearing, Respondent was challenged to explain the orders he signed, he stated--unequivocally, emphatically and repeatedly--that he signed only one of the orders, and that the other orders did not bear his signature. He did not say that he was unsure, or that he could not recall signing; he said he did not sign and, in some instances, gave specific explanations and justifications for why he would never sign those orders. Commission counsel was forced to retain a handwriting expert to examine the signatures on the orders. Only after Respondent was made aware of that expert's findings did he admit that he signed the orders in question.

Included among Respondent's explanations/justifications at the Show Cause hearing for why he did not/would not have signed the orders were the following:

- He never signs an order without a petition. (Ex. 4 at 45). Yet no petitions were filed in support of the July 28, 2011 order (Ex. 5 at 101) or the August 2, 2011 order (Ex. 5 at 103-04).
- He never signs an order if the accompanying petition is not in proper form. (Ex. 4 at 45). Yet not one of the petitions that were filed was signed or verified by the Conservator. (Ex. 5 at 127-31, 183-84, 185-98, 199-215).
- He never signs an order where his signature stands alone on the second page, yet that is precisely the case with the August 2, 2011 order (Ex. 5 at 103-04).

During the March 12, 2015 Formal Hearing, after having been forced to admit his signatures, Respondent was asked to explain his earlier denials. His responses not only showed no remorse, they showed further deception, as detailed above.

The Supreme Court recently "modified the moral turpitude factor to consider instead 'the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to *it.*'" *Harris,* 131 So. 3d at 1146 (quoting *Skinner,* 119 So. 2d at 307). "To determine the extent to which the conduct was willful, [the Supreme Court] will examine 'whether the judge acted in bad faith, good faith, intentionally, knowingly, or negligently.'" *Id.*

Respondent testified that he was influenced by another judge to involve himself in the Newsome Conservatorship. Respondent's actions when signing the orders presented to him by McNulty may not have been intended to commit harm to the ward, but they did; and his actions were not performed with the degree of diligence required of a chancellor overseeing a ward's estate. Respondent testified that he trusted and had faith that lawyers presented him with documents that were truthful and in the best interest of their clients. However, by relying on lawyers to be ethical and forthright, and failing to follow the Uniform Chancery Court Rules, and his responsibilities as "superior guardian," Respondent failed in one of his most important roles as a chancellor. *Mathews v. Williams,* 633 So. 2d 1038 (Miss. 1994); *Union Chevrolet Co. v. Arrington,* 138 So. 593 (Miss. 1932). "Claim of ignorance of the duties of his office or negligence in carrying out those duties as a defense to judicial misconduct is tantamount to an admission by an

accused judge that he does not possess the qualifications necessary to hold the office to which he has been elected." *Willard,* 788 So. 2d at 746. Respondent's untruthful testimony during the November 1, 2013 Show Cause hearing was misleading and it was intentional. Respondent denied signing numerous orders. Respondent made statements saying he would never sign orders such as those exhibited to him. That sworn testimony was made intentionally and knowingly. Respondent made explicit statements of denial during the Show Cause hearing, and those statements were false and misleading. Only when confronted with the force of an expert's analysis of his handwriting did Respondent finally admit signing the orders, and even then his testimony at the Formal Hearing was neither straightforward nor contrite.

(6) The presence or absence of mitigating or aggravating factors. Respondent made statements during the Show Cause hearing that were emphatic statements of denial. Respondent did not answer during his examination with responses such as "I do not know" or "I am not sure." He answered with explicit denials such as, "I have never in my life signed a second page with a signature blank on it and that's all." (Exhibit 4 at 37). He was not struggling with a clouded memory. He was trying to deflect blame. His statements were misleading and were an attempt to thwart the Commission's search for truth. As a trial judge, especially a chancellor, Respondent is charged with the dual role of finder of fact and finder of law. Respondent is charged with the duty to find witnesses credible or not credible. Respondent has irreparably damaged his own credibility by making false and misleading statements while under oath, and should not have the opportunity to pass judgment on others' credibility.

RECOMMENDATION

Having considered the foregoing findings, the Commission recommends that Respondent be removed from office. The Commission further recommends that Respondent be fined the sum of $2,500 and ordered to pay the costs of these proceedings in the sum of $5,882.67.

RESPECTFULLY SUBMITTED, this 25th day of June, 2015.

MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

By: Lee J. Howard
Hon. Lee J. Howard, Chairman

CERTIFICATE OF SERVICE

In compliance with Rule 25(d) of the Mississippi Rules of Appellate Procedure, I, Darlene D. Ballard, Executive Director for the Mississippi Commission on Judicial Performance, do hereby certify that I have this date electronically filed the foregoing Record Excerpts on behalf of the Mississippi Commission on Judicial Performance, with the Clerk of the Supreme Court of Mississippi using the MEC system which sent notification to the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Judge Lee J. Howard
Commission Chairman
660 North Street, Suite 104
Jackson, MS 39202

This the 30th day of July 2015.

/s/ Darlene D. Ballard

Darlene D. Ballard